Supreme Court, U. S.
FILED
SEP 29 1975
MICHAEL RODAK, JR., CLERK

No. 75-132

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROLAND E. JEFFORDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The question presented is whether the sole stockholder of a "Subchapter S" corporation may invoke his personal privilege against self-incrimination as a ground for refusing compliance with a grand jury subpoena requiring production of the corporation's financial records.

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[1] We have altered the caption of this case to reflect the parties in interest.

Petitioner is the president and sole stockholder of Jeffords Marine, Inc., a corporation qualifying for federal tax treatment under Sections 1371 to 1378 (Subchapter S) of the Internal Revenue Code of 1954, 26 U.S.C. 1371 to 1378. Pursuant to these provisions, the corporation was taxed, at petitioner's election, substantially as if it were a partnership, so that profits and losses were reportable by petitioner on his individual return. Petitioner was subpoenaed to appear before a grand jury and to bring with him the corporation's cash receipts, cash disbursements, and sales journals for certain years (Pet. App. 1a-2a). Although petitioner appeared before the grand jury, he refused to comply with the subpoena, asserting his Fifth Amendment privilege against self-incrimination. The district court denied petitioner's motion to quash the subpoena and ordered him to produce the requested corporate records (Pet. 2-3). Upon petitioner's refusal, the district court adjudged him in civil contempt (Pet. App. 76a). The court of appeals affirmed by order (Pet. App. 78a-79a).

Petitioner's contention that he is entitled to invoke his Fifth Amendment privilege as a bar to production of the records of a wholly-owned Subchapter S corporation is without merit. It has long been held that the personal privilege against self-incrimination does not extend to corporate records held in a representative capacity. See, *e.g.*, *Wilson* v. *United States*, 221 U.S. 361; *Dreier* v. *United States*, 221 U.S. 394; *Wheeler* v. *United States*, 226 U.S. 478. This rule applies without regard to the size of the corporation,

and indeed has been applied by this Court to the records of a corporation that, like petitioner's, had only a single stockholder. *Grant* v. *United States*, 227 U.S. 74, 76-77. As this Court recently observed in *Bellis* v. *United States*, 417 U.S. 85, 100, "no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." See also *Reamer* v. *Beall*, 506 F.2d 1345 (C.A. 4), certiorari denied, 420 U.S. 955.

This is true whether or not the corporation in question qualifies for the special elective tax treatment afforded by Subchapter S. See *United States* v. *Richardson*, 469 F.2d 349 (C.A. 10); *United States* v. *Mid-West Business Forms, Inc.*, 474 F.2d 722 (C.A. 8). *Richardson* involved the owner of substantially all of the stock in a Subchapter S corporation; *Mid-West Business Forms, Inc.* involved the sole owner of such a corporation. Both courts held that "corporations which are treated under the provisions of Subchapter S retain their corporate character" (*Richardson, supra*, 469 F.2d at 351) and that "although the tax laws allowed income to be channeled from the corporation to the shareholders, it was not the intent of Congress to eliminate the corporation itself or to convert it [to something else]." *Mid-West Business Forms, Inc., supra*, 474 F.2d at 723.

Petitioner's corporation is a separate legal entity organized under and recognized by state law. Accordingly, its "records do not contain the requisite element of privacy or confidentiality essential for the privilege to attach." *Bellis* v. *United States, supra,*

417 U.S. at 92. This is true regardless of the fact that the corporation is owned by a single shareholder who has elected to be taxed as a sole proprietor. By choosing to do business in corporate form, petitioner relinquished his personal privacy interest in the records of the business. *Grant* v. *United States, supra; Wild* v. *Brewer*, 329 F.2d 924 (C.A. 9), certiorari denied, 379 U.S. 914; *Hair Industry, Ltd.* v. *United States*, 340 F.2d 510 (C.A. 2), certiorari denied, 381 U.S. 950.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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